United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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B/S

75-1333

To be argued by
HERBERT S. KASSNER

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1333

UNITED STATES OF AMERICA,

Appellee,

against

MARTIN J. HODAS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

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THE OPINION BELOW

It would be an understatement to conclude that the Court below accepted every single statement of the New York City detective relating to the facts surrounding the searches and seizures involved in the instant case without regard whatsoever to the overwhelming conflicting testimony of interested as well as disinterested witnesses which testimony is corroborated by compelling reason. The Court below not only accepted the testimony of the New York City policeman but went far beyond it in findings of fact. Thus, where the policeman testified, in contradiction of five witnesses, that the workshop door to the premises of defendant was slightly ajar,that he could not enter without pushing it open, and that he did push the door open, the Court concluded on Page 2 of its opinion that the door "was open". The fact that five witnesses testified that the door was always closed and locked in order to prevent customers of the book store from entering the workshop premises, was totally disregarded by the Court. The fact that these witnesses always testified that the door had a sign on it which clearly marked it as separate premises and forbade all people to enter, only hesitantly and tentatively denied by the policemen, was never mentioned in the opinion. The fact that the Judge was willing to conclude that all of the film was "pornographic" (Page 9 of opinion) despite the fact there is no basis whatsoever for such conclusion, colors the factual findings of the Court below and indicates its basis. It is not, however, for the foregoing reasons that appellant urges upon this Court

the reversal of the determination by the Court below on the issue of suppression. It is respectfully submitted that even if the findings of fact of the Court below are accepted, suppression is mandated.

In the words of the Court below, "Once inside the room Gray noticed a film box which had a still photo pasted to it. By looking at the film leader, he saw the title 'Sex Nurse,' and by looking at the frames, he saw that the film was 'Sex Nurse,' which had been 'deemed' obscene." Thus, while searching for books and records evidencing the operation of a business involved in the sale of obscene magazines pursuant to the first warrant, Gray admitted and the Court found that he engaged in an exploratory search in which he opened a box of film, read the film leader, unreeled the film, held it up to the light and determined that it was an obscene film. If this is not a search undertaken without probable cause and without warrant, nothing is.

The Court goes on to state that Detective Gray then continued to search other films in film boxes in defendant's workshop as well as the basement thereof after having been advised by the employee of defendant in the premises that the premises were operated by East Coast and not by the book store. Gray testified that the employee offered to prove this by showing him around the entire premises. The employee denied this on the stand, but this, of course, was ignored by the Judge. Even if it be conceded that the employee showed the detective around, can this be anything less than submission to authority after the policeman had entered the premises? If this is a consensual search, then the Fourth Amendment

becomes meaningless.

During the cross-examination of Detective Gray he testified quite conclusively and repeatedly that he seized three films from the premises and brought them to Judge Weiss for the purpose of having warrants issued to search and seize from defendant's premises at 210 West 42nd Street and 113 West 42nd Street. On redirect, he changed his story and stated that he did not take any of the three films from the premises, but rather obtained two copies of prints with the same names which had been seized in other raids on other stores and brought them before Judge Weiss. The Court totally ignores the unequivocating testimony of Detective Gray repeatedly uttered on cross-examination and finds as a fact his recanted testimony, directly opposite that given on redirect. Furthermore, the opinion below does not even comment on the fact that there is no indication from the face of Judge Weiss' warrant for the search of 210 West 42nd Street that the viewed the two films that were brought to him and found them obscene prior to issuance of the warrant. Without such viewing and finding it cannot be doubted that the warrants would be invalid under the doctrine of Heller v. New York, 413 U.S. 483 (1973). Furthermore, since Gray recanted his testimony with respect to the film "Sex Nurse" and denied on redirect examination having brought that film before Judge Weiss, and since that film was the only film mentioned in the warrant for the search of 113 West 42nd Street issued by Judge Weiss, it must be concluded that the Judge could not have possibly viewed the film and determined its obscenity for purposes of issuing

that warrant out of which all of the evidence in the instant trial was secured. This, too, is ignored by the Court below in its opinion. It cannot be overemphasized that not only did the warrant for the search of 113 West 42nd Street issued by Judge Weiss not set forth that he had viewed the film mentioned in the warrant, "Sex Nurse" and determined that it was obscene, but Detective Gray, in testimony accepted by the Judge below, his redirect testimony, admitted that he never brought the film for scrutiny to Judge Weiss. The Court below seems to rest its finding as to this warrant on the "deeming" which had taken place a month earlier in connection with another film by the same name brought to another Judge. The Court, however, failed to explain how it could depend upon such deeming when a warrant issued by that prior Judge over ten days before the seizure in the instant case could not have been used to make the seizure in the instant case even if the premises had been described in that warrant. The testimony at the hearing clearly indicated that there had never been a determination of the obscenity of the film "Sex Nurse" to the knowledge of Detective Gray to the date of the hearing. It had never been found obscene by any Judge at any time. Notwithstanding the foregoing, the Court below upheld the seizure of all of the books and records of defendant at 113 West 42nd Street, records which supplied the essential testimony for the conviction of defendants herein, on the basis of the mention therein of one film, "Sex Nurse", which the Judge did not even see prior to the issuance of the warrant, which had not been the subject of an adversary proceeding to that date, and which has

not been the subject of an adversary hearing to this very day, and which does not even appear on the inventory return as having been seized.

On the issue of standing the Judge concludes that there is no question that the initial warrant was issued properly. This is not exactly correct. Defendant concedes that it had no standing to attack the issuance of the other warrant since it was not directed against defendant's premises. That the workshop premises were frequently entered by both defendants at trial and were under the general supervision of defendant herein, the President of the corporation leasing the said premises, is undeniable. To say that the defendant herein had no proprietary interest in the workshop of the corporation which he wholly owned and which he directed as President, is a fiction which the Fourth Amendment must not tolerate. The attempt by the Court below to limit the doctrine of Mancusi v. DeForte, 392 U.S. 364 (1968) to a case in which there is a possessory interest as opposed to a proprietary interest, is not supported by the case. The fact that employees of the book store could, on occasion, after calling employees in the workshop and arranging to be admitted, utilize the bathroom in the workshop, did not, as the Court below concluded turn the workshop into a public place subject to intrusions by law enforcement officials without warrant or probable cause. The attempt by the Court below to place the defendant at the workshop "only irregularly" is ludicrous in view of the testimony at the hearing. In any event, is it the obligation of the President and sole owner of a corporation to spend full time at each and every work place of the corporation in order to assure his standing to object to illegal intrusions by law enforcement officers? Where five people testified

that the door to the premises were always locked and marked with a sign naming the corporation and stating "do not enter", can this be ignored on the issue of whether there was an "expectation of privacy" as referred to in Mancusi?

Nevertheless, the Court below concluded that defendant failed to sustain his burden of proof that the search of 210 West 42nd Street was illegal. To thus conclude, the Court would have to be totally oblivious of First Amendment principles 'engrafted' into the Fourth Amendment which holds that a police officer searching for books and records of a corporation selling magazines may not open boxes containing film, unravel the film, hold the film up to the light, and then seek a warrant to "cleanse" the illegal search. The Court below must be totally oblivious of the law relating to prior judicial scrutiny of allegedly obscene materials and the necessity of a Judge's viewing the materials, making a finding of obscenity, and then, and only then, issuing a warrant for the seizure of the allegedly obscene materials and the arrest of its purveyors.

The Court below then goes on to conclude that defendant had standing to challenge both the warrant issued and the execution of that warrant as to 113 West 42nd Street. This is the premises in which the materials introduced at the trial herein was found. The Court skips over the "deeming" issue and the fact that Judge Weiss never saw the film "Sex Nurse" which was the basis for the issuance of the warrant to search and seize the books and records of East Coast from 113 West 42nd Street. He finds that he need not discuss that issue since the seizure of all of the

books and records of a corporation pursuant to a warrant which does not designate specifically which books and records are subject to seizure does not violate First Amendment principals against prior restraint as incorporated into the Fourth Amendment. Totally ignored is a line of cases commencing with Near v. Minnesota, 283 U.S. 697 (1931) and running through Stanford v. Texas, 379 U.S. 476 (1965) and Roaden v. Kentucky, 413 U.S. 496 (1973). The Court below cannot visualize a business engaged in the dissemination of First Amendment material being shut down and closed through the seizure of all of its books and records. This is exactly what happened in the instant case and exactly what was condemned in a companion case by the Courts of the State of New York. People v. Star Distributors, Ltd. - Supreme Court, New York County, N.Y.L.J., January 18, 1973, Page 15, Column 6 (Martinez, J.) The massive seizure under the Weiss warrant for the search and seizure of all books and records of East Coast was condemned by this Court and the materials ordered returned. Hodas v. Hogan, 72 Civ. 554 (S.B.N.Y., February 15, 1972 - Bauman, J.) If Judge Bauman could understand that the seizure at 113 West 42nd Street was a massive seizure in violation of the First, Fourth and Fourteenth Amendments, a seizure which required immediate return of that which was seized, why should this concept be foreign to the Court below? While it is true that Judge Bauman in Hodas v. Hogan did not have the benefit of the Supreme Court decision in Roaden v. Kentucky, supra, and, therefore, insisted upon ensuring the right of the People of the State of New York to secure that material as future evidence, the Court below was in no such

position. In Roaden it was clearly held that a massive seizure in violation of the First Amendment is an unreasonable search and seizure under the Fourth Amendment and that any tenuous distinctions theretofore made by various Courts could no longer be sustained. Thus when the Court below held that the purpose behind such holdings as that in Hodas v. Hogan, supra, is to avoid prior restraint but not to sanction suppression, it was making a finding directly in violation of Roaden. Roaden recognized that the only way to ensure against prior restraints of expression was to treat such prior restraints in the same manner as any other unlawful searches and seizures, by suppressing the use of the material seized. The attempt by the Court below to utilize the Heller ruling to justify the warrant for the search of 113 West 42nd Street manifests an utter and complete lack of comprehension of Heller. In Heller, the Judge issuing the warrants scrutinized the entire film, found it obscene, and issued the warrant for the arrest of its exhibitor and its seizure. In the instant case Judge Weiss did not see the film which was the basis for the issuance of the warrant, and then issued a warrant for the seizure of all of the books and records of the alleged "distributor" of the film.

The Trial Court then goes on to state that affidavits for warrants must be construed liberally and flexibly. This begs the question. It is not the affidavit for the warrant that presents the problem in this case, but rather the warrant itself. Nowhere does the Court cite the hornbook law that a warrant must specifically state and identify the place to be searched and the matter to be seized. When First Amendment rights are involved, particularization of the matter to be seized becomes even more essential. This is why the Stanford case

held the warrant in that case to be a general warrant and all matters seized to be suppressible. This is why the Roaden case cites the Stanford case when incorporating the First Amendment principles of search and seizure into the Fourth Amendment.

On Pages 12 and 13 of his opinion, the trial Judge below attempts to muddle and entwine the two applications for the two separate warrants, one for the search at 113 West 42nd Street, and the other for the search of 210 West 42nd Street. He argues that the viewing by Judge Weiss of the two films in connection with the affidavit for the search of 210 West 42nd Street and the deeming of Judge Weiss that such films were obscene (despite the fact that there is no recitation in the warrant of such viewing and determination), somehow justified the issuance of the warrant based on another application for the search of 113 West 42nd Street. No case is cited by the Trial Court for this novel theory of judging the adequacy of a warrant on the basis of material other than the contents of the affidavit seeking such warrant and the warrant itself. The reason is simple, there is no authority for such action.

In the last paragraph of Page 13 of the opinion of the Court, it is explained why Judge Bauman's decision in Hodas v. Hogan, supra, is ignored by the Trial Court below. It is stated that the intervention of Heller v. New York, supra, "prevents the operation of collateral estoppel". It is respectfully submitted, as has been noted heretofore, that Heller has absolutely nothing to do with the facts of the instant case. All Heller held was that no adversary proceeding was required prior to the seizure of a single copy of expressive matter where there has been prior judicial scrutiny of the matter, a determination by the Judge of its obscenity, and the granting to the seized party of a

reasonably prompt adversary hearing after the seizure. The warrant for the seizure of all of defendant's books and records was not preceeded by prior judicial scrutiny of expressive matter, a determination of obscenity, and a prompt opportunity for an adversary hearing. Heller has no relation whatsoever to the massive seizure of books and records in the instant case. The only recent case that does have a definite relation to the seizure at 113 West 42nd Street is Roaden v. Kentucky, supra.

The Trial Court decision below concludes with a statement that the seizure of business records is essential to the proving of a crime of wholesale promotion of obscene materials. It is respectfully submitted that this does not justify the wholesale seizure of business records. There are many things that the government would like to seize and that might help the government prove a case against a particular defendant, but which may not be seized in the particular manner which the government attempts to pursue. To follow the Trial Court's reasoning, it is permissible to burn the house to roast the pig. It is respectfully submitted that this is not the law, that the State Court Judge who suppressed the evidence of the instant case and the Federal Court Judge who found a massive seizure warranting return of the material were both correct, and that the Trial Court below erred by failing to be guided by their determinations and the sound constitutional principles which underlay such determinations.

Since the case of Stanford v. Kentucky, supra, is crucial on the issue of whether or not the 113 West 42nd Street warrant was a general warrant and, hence, void on its face, it should be noted that the Trial Court's understanding and review of that case was superficial to say the least. Judge Weiss's warrant for the search of 113 West 42nd Street did not specify with any particularity which

records of defendant were or were not to be seized. It therefore left to the unfettered discretion of the police officers executing the warrant the determination of what should and what should not be seized. A cursory glance at the inventory of things seized reflects the graveman of such a procedure and the reason why the Fourth Amendment and the statutes of the State of New York require specificity of "things to be seized" and not merely specificity of places. The langauge of the 113 West 42nd Street search warrant cannot be differentiated from the search warrant which Stanford, supra, unanimously held void as a general warrant.

In Stanford, supra, under Texas Law, Texas outlawed various activities of the Communist party just as New York outlaws "obscenity". A District Court Judge in Texas authorized a search for and seizure of the books and records concerning the operations of the Communist party.

The Supreme Court in Stanford described the search warrant as follows: (379 U.S. at 478, 479)

> ". . . a place where books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas are unlawfully possessed . . ."

Stanford unanimously held the search warrant overbroad and void as a general warrant.

Stanford emphasized that the particularity was specially required where the "things" to be seized consisted of books and records of ones engaged in the exercise of First Amendment rights. (379 U.S. at 485) and cited the classic First Amendment obscenity case of A Quantity of Books v. Kansas, supra, 378 U.S.

205. Stanford held the Courts must be even more careful where the business records and ledgers dealt with one exercising First Amendment rights as opposed to one keeping invoices and records of stolen property. (379 U.S. at 485 Nt. 16).

The Court said (379 U.S. at 485):

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See Marcus v. Search Warrant, 367 U.S. 717; A Quantity of Books v. Kansas, 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms."
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> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." (Underlining supplied)

Stanford held the warrant void.

People v. Star Distributors, Ltd., et al., Sup. Ct. New York County, N.Y.L.J. 1/18/73 Page 15 Column 6 (Martinez, J.) involved exactly the same principle and a search warrant which as far as books and records were concerned was as broad as the warrant here involved. The Court granted the motion to suppress on the basis of Stanford v. Texas.

It should be noted that Stanford was emphatically relied on and quoted with approval in Roaden v. Kentucky, supra 413 U.S. 496, at 504 (1973). A word is in order in this regard because Roaden, along with Heller v. New York, are the most recent decisions of the Supreme Court dealing with search and seizure in the area of alleged obscenity.

Respectfully submitted,

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